

**FILED**

**JUL 28 2003**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON  
U.S. COURT OF APPEALS**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TOMAS MARTINEZ-GARCIA,

Defendant - Appellant.

No. 02-50512

D.C. No. CR-02-00599-BTM

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
Barry T. Moskowitz, District Judge, Presiding

Submitted July 18, 2003\*\*  
Pasadena, California

Before: NOONAN, KLEINFELD, and WARDLAW, Circuit Judges.

Agent Fox's expert testimony on drug value did not explicitly or implicitly  
present a profile of a person in a drug trafficking organization, so this case is not

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\* This disposition is not appropriate for publication and may not be cited to or  
by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* This panel unanimously finds this case suitable for decision without oral  
argument. See Fed. R. App. P. 34(a)(2).

affected by United States v. Vallejo.<sup>1</sup> Nor did admitting Agent Fox's testimony violate Federal Rule of Evidence 704's prohibition on the use of expert testimony regarding mens rea, as Agent Fox did not testify or infer Martinez-Garcia's mental state.<sup>2</sup> The testimony bore on scienter and intent, entirely independently of whether Martinez-Garcia was acting alone or as part of an organization.

Because Inspector Abernathy's testimony regarding alterations to the engine compartment were based on his direct observations and were within the purview of a lay person's knowledge, his testimony was not undisclosed expert testimony.<sup>3</sup> The district court did not abuse its discretion by admitting it.

As it relies on Harris v. United States,<sup>4</sup> Martinez-Garcia's challenge to the constitutionality of the drug statutes must fail because a panel of this Court already reaffirmed our prior holdings that these statutes are constitutional.<sup>5</sup>

AFFIRMED.

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<sup>1</sup> 237 F.3d 1008, 1015-17 (9th Cir.), as amended by 246 F.3d 1150 (9th Cir. 2001).

<sup>2</sup> See United States v. Morales, 108 F.3d 1031, 1037 (9th Cir. 1997) (en banc).

<sup>3</sup> See Fed. R. Evid. 701.

<sup>4</sup> 536 U.S. 545 (2002).

<sup>5</sup> United States v. Hernandez, 322 F.3d 592, 600-02 (9th Cir. 2003), petition for cert. filed, No. 02-11098 (June 3, 2003).